COMMONWEALTH OF MASSACHUSETTS

FRANKLIN, SS.

SUPREME JUDICIAL COURT
DOCKET No.:

APPEALS COURT
DOCKET NO.: 2014-P-1322

COMMONWEALTH

v.

RANDY LEBLANC
Defendant / Appellant

APPLICATION FOR FURTHER APPELLATE REVIEW

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FRANKLIN, SS

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COMMONWEALTH OF MASSACHUSETTS

V.

RANDY LEBLANC
Defendant-Appellant

APPLICATION FOR FURTHER APPELLATE REVIEW

Now comes the defendant in the above-entitled matter and applies, pursuant to Mass. R. App. P. 27.1, for leave to obtain further appellate review of his conviction in Orange District Court, Docket 1342-CR-0271 of one count of leaving the scene of property damage in violation of Massachusetts General Law Ch. 90, Section 24.

This application is based on "substantial reasons affecting the public interest or the interest of justice." *Mass. Appeals Court Rule 27.1*

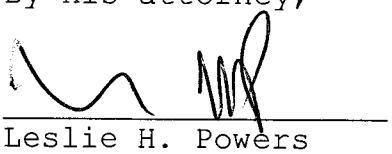
The question is whether a collision must occur on a public way in order for a person to be convicted of leaving the scene of property damage. With the Rule 1:28 decision in this case (attached) there are now two Rule 1:28

decision would support answering this question "No."

However, this is in direct contradiction of the District Court Jury Instructions, which have been cited in full Appeals Court decisions cases, which have a collision being on "public way" as being a necessary element of a conviction. *See Commonwealth v. Velasquez*, 76 Mass. App. Ct. 697,698-699 (2010).

The public is in need of clarity on this point.

Respectfully submitted,
Randy LeBlanc,
By his attorney,



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November 23, 2015

COMMONWEALTH OF MASSACHUSETTS

FRANKLIN, **SUPREME JUDICIAL COURT**

DOCKET NO:

APPEALS COURT

DOCKET NO.: 14-P-1322

COMMONWEALTH OF MASSACHUSETTS

V.

RANDY LEBLANC

MEMORANDUM IN SUPPORT OF APPLICATION FOR FURTHER APPELLATE REIVEW

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE DEFENDANT WAS DENIED HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS WHEN THE COMMONWEALTH FAILED TO PROVE AN ESSENTIAL ELEMENT OF THE CHARGED OFFENSE BEYOND A REASONABLE DOUBT.

STATEMENT OF THE CASE

Nature of the Case

The defendant, Randy LeBlanc appeals from his conviction of the single count of leaving the scene of

property damage in violation of Mass. Gen L. Ch. 90, Sec 24 (2)(R.2).

Prior Proceedings and Disposition in the Court Below

On March 14, 2014, Mr. LeBlanc was found guilty, after a bench trial before the Hon. David S. Ross, of a single count of leaving the scene of property damage (R.3). Mr. LeBlanc took a timely appeal and this Court entered the case on its docket on August 25, 2014 (R. 6).[1]

After the filing of Briefs, Supplemental Briefs were filed addressing whether Mass. Ch. 90 Sec. 24 only criminalizes leaving the scene after property damage if the place of the collision was a "public way."

Oral Argument was held on September 8, 2015. The Appeals Court entered its opinion upholding the conviction on November 6, 2015 in the form of a Rule 1:28 Memorandum and Order.

STATEMENT OF FACTS

[1] The trial transcript will be cited to volume and page as
(Tr.) and the Record Appendix will be cited as (R.).

Background

On or about March 12th, 2013, Randy LeBlanc received a phone call from his friend, Michael McCarthy (Tr.36). They had been friends for several years and had visited at each other at their respective homes (Tr.38; 54; 56).

Mr. McCarthy asked if Mr. LeBlanc could come over and give him a ride to the local Cumberland Farms (Tr.52).

At the time he called, Mr. McCarthy was living at 363 White Pond Rd. in Athol with Jessica Desaulniers and her mother, Ms. Breen (Tr.30;37).

There is agreement that Mr. Leblanc struck a red Chevrolet (hereinafter "the red car) which was parked in the driveway of the White Pond property (Tr. 43; 49; 51; 53)

Commonwealth's case

The Commonwealth called four witnesses. Mr. McCarthy denied being in the car when the accident occurred (Tr.49). He claimed that he did not see the damage to the car until the return trip when Mr. LeBlanc backed half way up the driveway and McCarthy

then got out of truck (Tr.43). He stated that he tried to wave Mr. LeBlanc down but Mr. LeBlanc just drove away (Tr.44-45). Mr. McCarthy also testified that Mr. LeBlanc backed up the driveway on both the pickup and drop off trips, blocking his view of the damage until Mr. LeBlanc drove away (Tr. 40-41;43). This makes no sense given the damage to Mr. LeBlanc's truck as observed by the police. *See discussion infra.*

Officer Dubrule of the Athol police testified that within an hour of being dispatched, he was at Mr. LeBlanc's home on Metropolitan Court in Athol (Tr. 11; 16). There he noted damage to the right front bumper of Mr. LeBlanc's truck, contradicting the idea that Mr. LeBlanc struck the red car while backing up (Tr.16). He confirmed that Mr. LeBlanc forthrightly admitted that he had slid into the red car. Mr. LeBlanc also indicated that he was going to try and work things out with the owner and at that point did not want to "deal with Mr. McCarthy or Ms. Desaulniers" (Tr.12).

Ancillary witnesses fleshed out the evidence. Jessica Desaulniers claims she was the one who called her mother at work to alert her to the damage to the

car (Tr.33. However, Ms. Breen said it was her son who called her (Tr.21). Neither Ms. Desaulniers nor Mr. McCarthy mentions anyone else being at the home.

Finally, Ms. Breen testified that she came right home and then called the police. But Officer Dubrule stated that when he got to the scene only Mr. McCarthy and Ms. Desaulniers were present (Tr. 9; 16).

Defendant's case

Mr. LeBlanc testified that Mr. McCarthy was with him when he hit the car and that it happened as he pulled up the driveway after taking Mr. McCarthy to the store (Tr. 51;53). This version is supported by the damage to his truck observed by the police officer and the tire tracks also seen by the police officer in the White Pond Road driveway(Tr.10;14).

ARGUMENT

I. THE DEFENDANT WAS DENIED HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS WHEN THE COMMONWEALTH FAILED TO PROVE AN ESSENTIAL ELEMENT OF THE CHARGED OFFENSE BEYOND A REASONABLE DOUBT.

The Fifth, Six and Fourteenth amendments to the United States Constitution and articles 10 and 12 of the Massachusetts Declaration of Rights guarantee a defendant's constitutional rights to confront witnesses, to due process of law and to a fair trial. U.S. Constitution Amends. 5, 6, and 14; Mass. Const. Pt. 1, art. 10 and 12; Commonwealth v. Neymar, 432 Mass. 23, 33 (2000); Commonwealth v. McCravey, 430 Mass. 738, 759-60 (2000), citing Commonwealth v. Moran, 353 Mass. 166, 171 (1967) (article 12 pertains to certain basic rights of an accused, including our equivalent of the Fourteenth Amendment's due process clause).

Additionally to preserve his rights under federal law, Mr. LeBlanc asserts a federal constitutional violation separately.

The lodestar of our jurisprudence is that a person is presumed to be innocent unless and until the government has proven each element of the crime

charged, beyond a reasonable doubt. Commonwealth v. Redmond, 53 Mass.App.Ct. 1, 6-7 (2001) citing In re Winship, 397 U.S. 358, 364 (1970).

The evidence in this case was insufficient to convict Mr. LeBlanc of leaving the scene after causing property damage, thus this conviction was in violation of due process and must be vacated.

When a trial is before judge, sitting without a jury, as it was here, the reviewing court has two separate standards for review.

First, findings of fact shall not be set aside unless they are found to be "clearly erroneous" Mass. Rule 52.

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Company, 833 U.S. 862,895 (1948).

Moreover since this appeal also presents application of law, under constitutional principles the reviewing court "shall scrutinize without deference the legal standard which the judge applied

to the facts." See Barboza v. MacLeod, 447 Mass. 468, 469 (2006).

A. Elements the Commonwealth Must Prove Beyond A Reasonable Doubt In Order to Obtain a Conviction For Leaving The Scene Of Property Damage

In order to convict a person of leaving the scene of property damage "the Commonwealth must prove beyond a reasonable doubt that (1) the defendant operated a motor vehicle ***(2) on a public way*** (3) and collided with or caused injury in some other way to another vehicle or to property; (4) the defendant knew that he had collided with or caused injury in some way to that other vehicle or property, and (5) after such collision or injury, the defendant did not stop and make know his name, address, and the registration number of his motor vehicle. *G.L. Ch. 90, Sec. 24 (2) (a)*. (Emphasis added).

This, one on the essential elements which the Commonwealth must prove, beyond a reasonable doubt, is that the collision which causes the property damage must occur on a public way. *Commonwealth v. Velasquez*,

76 Mass. App. Ct. 697, 698-699 (2010).[2] There is no dispute that the collision, which serves as the basis of this Complaint, occurred in the driveway of a private home (Tr.19, 22-23, 23, 40-41).

The essential nature of this element is also supported by the recently updated District Court Jury Instructions. *See Instruction 5.180, Massachusetts District Court Jury Instructions (revised January 2013).*

This common sense reading of the statute is in accord with long-standing Massachusetts rules of statutory construction. As a threshold matter, the Court reviews statutory interpretations *de novo*. *Sheehan v. Weaver*, 467 Mass. 734, 737 (2014). Additionally, when interpreting laws in general, the "[court's] responsibility is to interpret {the law] as written, assigning to each word and phrase its ordinary meaning..." *Hassey v. Hassey*, 85 Mass. Appt. Ct. 518, 525 (2014).

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[2] There is a 1:28 decision from 2008 which takes the opposite view. *See Commonwealth v. Brazee*, (1:28 opinion February 6, 2008) However, this is not a published opinion and of limited precedential value. Moreover, Justice Green was on the *Breeze* panel. It must be noted that Justice Green wrote the decision in *Velasquez* which clearly lists "public way" as an essential element.

Finally, the Supreme Judicial Court has been clear: "[W]e do not read into [a] statute a provision which the Legislature did not seem fit to put there, nor add words the Legislature had an option to, but chose not to include." *Adoption of Daisy*, 460 Mass. 72, 77 (2011).

The plain language of the statutory section at issue makes it clear that the legislature intended to criminalize a host of activities, if the activities took place on a public way or where the public had a right to access.

The first phrase of Chapter 90, Sec. 24 (2) (a) sets the stage as to where certain acts are prohibited to occur. It states "whoever upon any way or in any place to which the public has a right of access, or any place to which members of the public have access as invitees or licensees…."

The statute then sets out 12 different acts which may not occurred on a public way. Of these 12 counts, 10 involved a vehicle in motion.

Moreover, the first 6 proscribed acts all linked together by connecting "or"s. There are no periods or semi colons or other punctuation which one could potentially argue act as a severance of the listed

acts from the predicate sentence which states the place where the acts may not occur: a public way or certain places where the public has access. It is the Court's duty to "interpret relevant [words in a statute] "not in a vacuum, but with reference to the statutory context, 'structure, history and purpose.'". *Abramski v. United States*, 134 S. Ct. 2259, 2276 (2014) quoting *Maracich v. Spears*, 133 S.Ct. 2191, 2209 (2013).

It is true that there are two prohibited acts in the middle of the first phrase of Section 2(a) which do not need to happen on a public way to be criminalized: "whoever makes false statements in an application for such license or learner's permit, or whoever knowingly makes any false statement in an application for registration or motor vehicle." *Mass. Gen. L. Ch. 90, Sec 24(2) (a)*. The statute then goes back to listing acts which require movement of a vehicle to considered infractions.[3]

The insertion of these two proscribed acts in a paragraph wherein all the other prohibitive acts

[3] These include prohibitions on cell phone use by minors and public transport drivers and limits on texting by all drivers.

involve a vehicle in motion, arguably creates ambiguity in the interpretation of the statute.

However, it is well settled that ambiguity in statute must be resolved in the defendant's favor under the rule of lenity. *Commonwealth v. Valiton*, 423 Mass. 647, 649 (2000) See also *Commonwealth v. Carrion*, 431 Mass. 44, 45-46 (2000).

Moreover, if the Legislature had wanted to prohibit the moving violations listed in section 24 (2) (a) from occurring on private land as well as public ways they could have, and should have inserted that specific language.

For example, in *Mass. Gen L. Ch. 90, Sec. 34J,* which speaks to the need to have vehicles insured and registered, the language specifies that the reach of that statute extends beyond the public arena and into private ways and lands. *See* Statutory Addendum.

Finally, reading at the statute calls for the prohibited acts take place on the public way is in accord with the historic purpose of the statute. As stressed in *Commonwealth v. Horsfall*, 213 Mass. 232, 236 (1913) when discussing an earlier version of the statute "its obvious purpose is to enable those in any way injured by the operation of an automobile ***upon***

a public way (emphasis added)to obtain…information (emphasis added)"

CONCLUSION

The Commonwealth failed to show any evidence that the accident in question took place on a public way or where the public has a right of access as either invitees or licensees. This is an essential element needed to support a conviction. Therefore, the conviction must be vacated and a judgment of not guilty entered for the Defendant.

The defendant,
Randy LeBlanc,
by his attorney

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Dated: 11/23/2015

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

14-P-1322

COMMONWEALTH

vs.

RANDY A. LeBLANC.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Randy A. LeBlanc, was convicted after a jury-waived trial of leaving the scene of property damage in violation of G. L. c. 90, § 24(2)(a). We affirm.

Viewing the evidence in the light most favorable to the Commonwealth, the judge was warranted in finding that on February 12, 2013, Michael McCarthy was in Athol at the home of his girlfriend, Jessica Desaulniers. McCarthy telephoned his friend, the defendant, who agreed to pick him up and take him to the store. The defendant arrived at the home driving his big, "[r]aised-up," Ford truck, which he parked in the driveway, front end first. McCarthy exited the home and entered the defendant's truck. The round trip from Desaulniers's house to the Cumberland Farms store took about ten minutes. When the defendant returned to Desaulniers's home, he backed his truck

onto the home's driveway. When McCarthy got out of the defendant's truck, he noticed that the Chevrolet Cavalier sedan that was parked in the driveway, with its front end facing the street, had been pushed back against a trailer and its hood was "pushed up." Despite waving his arms to hail the defendant, the defendant "just left."

The defendant admitted to McCarthy that his truck had collided with the other vehicle in the driveway. The defendant also told the investigating police officer that he had entered the driveway too fast and when he tried to stop, his truck slid into the Cavalier. That officer also observed damage to the right front bumper of the defendant's truck. The defendant told the officer that he would pay for the damage to the Cavalier. He also apologized to Desaulniers's mother, the Cavalier's owner, and promised "to work something out." The defendant, however, failed to make any payments for the damage to the Cavalier.

Discussion. The parties obtained leave of court to file supplemental briefs on a question of law that they regarded as unsettled and potentially dispositive -- namely, whether in a prosecution for leaving the scene of a motor vehicle collision that causes property damage, without stopping and making one's identity known, the Commonwealth must prove that the collision occurred on a public way. However, our analysis leads us to

conclude that the parties misunderstand the principal precedent interpreting G. L. c. 90, § 24(2)(a).

In Commonwealth v. Platt, 440 Mass. 396, 400 n.5 (2003), the Supreme Judicial Court, reviewing a conviction under § 24(2)(a), determined that the evidence presented by the Commonwealth was sufficient to establish that the defendant was the operator of the vehicle. The court made the following observation: "To support a conviction on the charge of knowingly leaving the scene of an accident involving property damage, the Commonwealth must present legally sufficient evidence for a reasonable fact finder to conclude the defendant operated the motor vehicle at the time of the accident resulting in property damage." Id. at 401. However, contrary to the assumption made by the parties in the case before us, the court in Platt did not state that the collision or incident resulting in damage to another person's vehicle or property must occur at the same precise moment in time as the defendant's operation on a public way. In fact, an examination of the facts in Platt demonstrates that this is not required.

In Platt, a homeowner "was roused from his sleep by his neighbors. He went outside and saw a vehicle on his front lawn 'with the wheels up in the air' and considerable damage to his property. [The homeowner] did not see anyone except the neighbors and the police in or around the overturned vehicle."

Id. at 397. Although no one was seen in or near the vehicle, the ensuing police investigation resulted in evidence that the defendant was operating the vehicle in question "immediately prior to the accident," which occurred on the homeowner's private property. Id. at 397, 401-402. In the case before us, the evidence was uncontroverted that both immediately before and after the collision that caused damage to the vehicle in the driveway, the defendant operated his truck on a public way. For this reason, we reject the defendant's claim that G. L. c. 90, § 24(2)(a) requires proof that the collision causing the property damage must itself occur on a public way.

The remaining issue raised by the defendant is that an honest, good faith, but mistaken belief that the operator has given adequate notice before leaving the scene of a collision causing property damage satisfies the operator's statutory duty. However, under § 24(2)(a), the operator in a case such as this is required to "make known his name, home address, and the registration number of his motor vehicle." Platt, supra at 400 n.5. It is not a defense that the defendant believed that he was known to persons at the scene. See Commonwealth v. Joyce, 326 Mass. 751, 752-753 (1951) (defendant's good faith belief that one or more persons at the scene knew his identity,

residential address, and the registration number of his vehicle was not a defense).[1]

Judgment affirmed.

By the Court (Vuono, Agnes & Maldonado, JJ.),[2]

Joseph F. Stanton

Clerk

Entered: November 6, 2015.

[1] It is unnecessary for us to consider the Commonwealth's argument that as written, the portion of § 24(2)(a) relevant here does not require proof of operation on a public way.

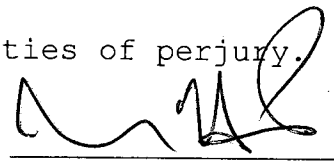
[2] The panelists are listed in order of seniority.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2)true copies of the within Application for Further Appellate Review was this day served upon all parties to this action by mailing same, first class postage prepaid, to A.D.A. Thomas H. Townsend, Appeals Division, Northwestern District Attorneys' Office, One Gleason Plaza, Northampton, MA 01060

SIGNED under the pains and penalties of perjury.

Dated: November 24, 2015



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